

1 SETH P. WAXMAN (*pro hac vice*)  
seth.waxman@wilmerhale.com  
2 PATRICK J. CAROME (*pro hac vice*)  
patrick.carome@wilmerhale.com  
3 ARI HOLTZBLATT (*pro hac vice*)  
ari.holtzblatt@wilmerhale.com  
4 WILMER CUTLER PICKERING  
5 HALE AND DORR LLP  
6 1875 Pennsylvania Avenue, NW  
Washington, D.C. 20006  
7 Telephone: (202) 663-6000  
Facsimile: (202) 663-6363

8  
9 *Attorneys for Defendant*  
10 **TWITTER, INC.**

11 [Additional counsel for each defendant are  
12 included on the signature page.]

DAVID H. KRAMER (CA SBN 168452)  
dkramer@wsgr.com  
LAUREN GALLO WHITE (CA SBN 309075)  
lwhite@wsgr.com  
WILSON SONSINI  
GOODRICH & ROSATI, P.C.  
650 Page Mill Road  
Palo Alto, CA 94304  
Telephone: (650) 493-9300  
Facsimile: (650) 565-5100

*Attorneys for Defendant*  
**GOOGLE INC.**

KRISTIN A. LINSLEY (CA SBN 154148)  
klinsley@gibsondunn.com  
JEANA BISNAR MAUTE (CA SBN 290573)  
jbisnarmaute@gibsondunn.com  
SHELI R. CHABON (CA SBN 306739)  
schabon@gibsondunn.com  
GIBSON, DUNN & CRUTCHER LLP  
555 Mission Street, Suite 3000  
San Francisco, CA 94105-0921  
Telephone: (415) 393-8200  
Facsimile: (415) 393-8306

*Attorneys for Defendant*  
**FACEBOOK, INC.**

16  
17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

19  
20 DEMETRICK PENNIE, RICK ZAMARRIPA

21 Plaintiffs,

22 v.

23 TWITTER, INC., GOOGLE INC.,  
24 FACEBOOK INC.,

25 Defendants.

Case No. 3:17-CV-00230-JCS

**REPLY MEMORANDUM IN SUPPORT  
OF MOTION OF DEFENDANTS  
TWITTER, INC., GOOGLE INC., AND  
FACEBOOK, INC. TO DISMISS THE  
AMENDED COMPLAINT PURSUANT TO  
FED. R. CIV. P. 12(b)(6)**

Judge: Hon. Joseph C. Spero

[Fed. R. Civ. P. 12(b)(6)]

Hearing Date: Aug. 25, 2017

**TABLE OF CONTENTS**

	<b>Page</b>
I. PLAINTIFFS CANNOT EVADE SECTION 230’S ROBUST IMMUNITY .....	1
A. JASTA Did Not Impliedly Repeal Or Abrogate Section 230 .....	1
B. Section 230 Bars Plaintiffs’ “Functionality” Theory .....	4
C. Targeting Advertising Does Not Make Defendants Content Providers.....	6
II. ALL OF PLAINTIFFS’ CLAIMS FAIL ON THEIR OWN TERMS .....	7
A. Plaintiffs Cannot Show Proximate Causation .....	7
B. Plaintiffs Cannot Save Their Secondary Liability ATA Claims .....	8
C. Plaintiff Pennie Cannot Plead a Cognizable Injury .....	11
D. Plaintiffs’ Other ATA Arguments Are Meritless .....	12
1. The FAC Fails To Allege Violations of 18 U.S.C. §§ 2339A and 2339B.....	13
2. Plaintiffs Do Not Allege Other Elements of “International Terrorism” .....	15
CONCLUSION.....	15

## TABLE OF AUTHORITIES

**Page(s)**

### **CASES**

<i>Ahmad v. Christian Friends of Israeli Cmty.</i> , 2014 U.S. Dist. LEXIS 62053 (S.D.N.Y. May 5, 2014) .....	8, 13
<i>Bank of Am. Corp. v. City of Miami</i> , 137 S. Ct. 1296 (2017).....	8
<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2008).....	4
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003) .....	4, 5, 6
<i>Blumenthal v. Drudge</i> , 992 F. Supp. 44 (D.D.C. 1998).....	6, 7
<i>Boim v. Holy Land Found.</i> , 549 F.3d 685 (7th Cir. 2008) .....	15
<i>Boim v. Quranic Literacy Inst.</i> , 291 F.3d 1000 (7th Cir. 2002) .....	15
<i>Branch v. Smith</i> , 538 U.S. 254 (2003) .....	1, 3
<i>Brill v. Chevron Corp.</i> , 2017 U.S. Dist. LEXIS 4132 (N.D. Cal. Jan. 9, 2017).....	7, 8, 15
<i>City of Sherman v. Henry</i> , 928 S.W.2d 464 (Tex. 1996) .....	12
<i>Cohen v. Facebook, Inc.</i> , 2017 U.S. Dist. LEXIS 76701 (E.D.N.Y. May 18, 2017) .....	3, 4, 5
<i>Doe v. Backpage.com, LLC</i> , 817 F.3d 12 (1st Cir. 2016) .....	3, 4
<i>Doe v. Bates</i> , 2006 U.S. Dist. LEXIS 93348 (E.D. Tex. Dec. 27, 2006).....	4
<i>Doe v. MySpace, Inc.</i> , 528 F.3d 413 (5th Cir. 2008) .....	4, 5
<i>Fair Hous. Council v. Roommates.com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008).....	6
<i>Fields v. Twitter, Inc.</i> , 200 F. Supp. 3d 964 (N.D. Cal. 2016) .....	4, 8
<i>Fields v. Twitter, Inc.</i> , 217 F. Supp. 3d 1116 (N.D. Cal. 2016) .....	4, 5, 8
<i>Freeman v. City of Pasadena</i> , 744 S.W.2d 923 (Tex. 1988) .....	12
<i>FTC v. Accusearch Inc.</i> , 570 F.3d 1187 (10th Cir. 2009).....	6
<i>Garcia v. San Antonio Hous. Auth.</i> , 859 S.W.2d 78 (Tex. App. 1993) .....	12
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 563 U.S. 754 (2011) .....	14
<i>Goldberg v. UBS AG</i> , 660 F. Supp. 2d 410 (E.D.N.Y. 2009) .....	10, 11, 14
<i>Halberstam v. Welch</i> , 705 F.2d 472 (D.C. Cir. 1983) .....	10, 11
<i>Hawaii v. Office of Hawaiian Affairs</i> , 556 U.S. 163 (2009) .....	3, 4
<i>Hinojosa v. S. Tex. Drilling &amp; Expl., Inc.</i> , 727 S.W.2d 320 (Tex. App. 1987).....	12

1	<i>Holder v. Humanitarian Law Project</i> , 561 U.S. 1 (2010).....	13
2	<i>Hui v. Castaneda</i> , 559 U.S. 799 (2010) .....	3
3	<i>Hussein v. Dahabshiil Transfer Servs. Ltd.</i> ,	
4	2017 U.S. Dist. LEXIS 11756 (S.D.N.Y. Jan. 27, 2017) .....	14
5	<i>Jones v. Dirty World Entm't Recordings LLC</i> , 755 F.3d 398 (6th Cir. 2014) .....	2, 6
6	<i>Kiffe v. Neches-Gulf Marine, Inc.</i> , 709 F. Supp. 743 (E.D. Tex. 1989) .....	12
7	<i>Kingdomware Techs., Inc. v. United States</i> , 136 S. Ct. 1969 (2016).....	3
8	<i>MCW, Inc. v. Badbusinessbureau.com, LLC</i> ,	
9	2004 U.S. Dist. LEXIS 6678 (N.D. Tex. Apr. 19, 2004) .....	6
10	<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	1
11	<i>Nat'l Ass'n of Home Builders v. Defs. of Wildlife</i> , 551 U.S. 644 (2007).....	2
12	<i>Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.</i> ,	
13	1999 U.S. Dist. LEXIS 11599 (S.D.N.Y. July 29, 1999) .....	10
14	<i>Packingham v. North Carolina</i> , 137 S. Ct. 1730 (2017).....	15
15	<i>PLIVA, Inc. v. Mensing</i> , 564 U.S. 604 (2011).....	2
16	<i>Pratt v. Martineau</i> , 870 N.E.2d 1122 (Mass. App. Ct. 2007) .....	7
17	<i>Radzanower v. Touche Ross &amp; Co.</i> , 426 U.S. 148 (1976) .....	2
18	<i>Rothstein v. UBS AG</i> , 708 F.3d 82 (2d Cir. 2013) .....	7
19	<i>Ryan v. Hunton &amp; Williams</i> ,	
20	2000 U.S. Dist. LEXIS 13750 (E.D.N.Y. Sept. 20, 2000) .....	11
21	<i>Standard Fruit &amp; Vegetable Co. v. Johnson</i> , 985 S.W.2d 62 (Tex. 1998) .....	12
22	<i>Strauss v. Credit Lyonnais, S.A.</i> , 925 F. Supp. 2d 414 (E.D.N.Y. 2013).....	8
23	<i>Temple-Insland Forest Prods. Corp. v. Carter</i> , 993 S.W.2d 88 (Tex. 1999) .....	12
24	<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988).....	1
25	<i>United Servs. Auto. Ass'n v. Keith</i> , 970 S.W.2d 540 (Tex. 1998) .....	12
26	<i>United States v. 493,850.00 in U.S. Currency</i> , 518 F.3d 1159 (9th Cir. 2008).....	1
27	<i>United States v. Heredia</i> , 483 F.3d 913 (9th Cir. 2007) .....	14
28	<i>Universal Commc'n Sys., Inc. v. Lycos, Inc.</i> , 478 F.3d 413 (1st Cir. 2007) .....	4, 5
	<i>Weiss v. Nat'l Westminster Bank PLC</i> , 768 F.3d 202 (2d Cir. 2014).....	13, 14

**STATUTES**

18 U.S.C. § 2331.....8, 9, 13, 15

18 U.S.C. § 2333..... passim

18 U.S.C. § 2339A.....13, 15

18 U.S.C. § 2339B .....13, 15

47 U.S.C. § 230..... passim

**MISCELANEOUS**

Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222,  
130 Stat. 852 (2016) ..... passim

1 Plaintiffs' Opposition ("Opp.") leaves no doubt that they want to hold Defendants liable  
2 for a terrible incident of violence based solely on the ground that some of Defendants' billions of  
3 users allegedly were able to post violent and/or objectionable material on Defendants' online  
4 platforms. While Defendants have profound sympathy for the victims of this crime, the law does  
5 not permit Plaintiffs' theory of liability. Plaintiffs' claims are barred by 47 U.S.C. § 230 and fail  
6 to meet the substantive requirements of the Anti-Terrorism Act ("ATA") and state tort law.

7 **I. PLAINTIFFS CANNOT EVADE SECTION 230'S ROBUST IMMUNITY**

8 As Defendants have shown, § 230 bars claims that seek to hold an online service provider  
9 liable as a "publisher" with respect to third-party content. Plaintiffs do not dispute that  
10 Defendants are providers of "interactive computer service[s]" or that the allegedly unlawful  
11 content at issue was supplied by third parties. The theories they do offer in an effort to evade  
12 § 230 all fail. *First*, an uncodified statement of purpose in the recently enacted Justice Against  
13 Sponsors of Terrorism Act, Pub. L. No. 114-222, 130 Stat. 852 (2016) ("JASTA"), did not  
14 impliedly repeal or "nullify" § 230. *Second*, despite Plaintiffs' attempt to characterize  
15 Defendants' conduct as providing communication "functionality" and "account reconstitution,"  
16 their claims still seek, impermissibly, to impose liability on Defendants as publishers. *Third*,  
17 clear case law applying § 230 defeats the theory that Defendants' alleged juxtaposition of third-  
18 party ads next to other third-party content made them providers of allegedly unlawful content.

19 **A. JASTA Did Not Impliedly Repeal Or Abrogate Section 230**

20 Plaintiffs first argue, without citing any authority, that Congress somehow "nullifie[d]"  
21 § 230 when it enacted JASTA last year. Opp. 3-4. Plaintiffs are incorrect.

22 "It is 'a cardinal principle of statutory construction that repeals by implication are not  
23 favored.'" *United States v. 493,850.00 in U.S. Currency*, 518 F.3d 1159, 1167 (9th Cir. 2008);  
24 *accord Traynor v. Turnage*, 485 U.S. 535, 548 (1988) (court will not infer a statutory repeal  
25 "unless the later statute 'expressly contradict[s] the original act'"). An implied repeal may be  
26 found only where two statutes "are in 'irreconcilable conflict,' or where the latter act covers the  
27 whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538  
28 U.S. 254, 273 (2003); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two

1 statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed  
2 congressional intention to the contrary, to regard each as effective.”). “[I]n either case, the  
3 intention of the legislature to repeal must be clear and manifest.” *Radzanower v. Touche Ross &*  
4 *Co.*, 426 U.S. 148, 154 (1976); *accord Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551  
5 U.S. 644, 662 (2007).

6 No such manifest intent or irreconcilable conflict is present here. Although JASTA made  
7 two specific amendments to *other* pre-existing statutes—the Foreign Sovereign Immunities Act  
8 (“FSIA”) and the ATA—it did not amend (or even reference) the immunity created by § 230 or  
9 address in any way the activities of online service providers. Nothing in JASTA’s text or history  
10 suggests any intent to override the established immunity that § 230 has provided for two  
11 decades—one that has repeatedly been “understood to merit expansion ... into new areas.”  
12 *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014). The operative  
13 provision of JASTA at issue, codified at 18 U.S.C. § 2333(d), states only that, under certain  
14 circumstances involving a defined act of international terrorism, “liability *may be asserted* as to  
15 any person who aids and abets ... or who conspires with the person who committed [the] act,”  
16 *id.* (emphasis added). It does not say that liability is *assured*—for example, by providing for  
17 liability “notwithstanding” existing immunities or defenses, including that provided to online  
18 service providers. *Cf. PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621-22 (2011) (describing absence  
19 of “*non obstante*” provision as indication that legislature did not intend a repeal by implication).

20 Congress’s silence about § 230 in enacting JASTA is particularly significant because the  
21 Act expressly—but only partially—curtailed a different immunity: namely, foreign sovereign  
22 immunity under the Foreign Sovereign Immunities Act (“FSIA”) for certain acts of international  
23 terrorism. *See* JASTA § 3(a) (negating sovereign immunity for acts of terrorism in the U.S.).  
24 JASTA’s partial repeal of the FSIA powerfully suggests that Congress meant to abrogate only  
25 that one immunity, not surreptitiously to repeal other statutory immunities nowhere mentioned in  
26 the text of the act or in the extended debates about its passage. Plaintiffs’ reading would not only  
27 render superfluous JASTA’s express (but partial) repeal of one immunity; it would also  
28 improperly override the careful lines Congress drew in effecting that partial appeal.

1 Applying JASTA as written also creates no “irreconcilable conflict” with § 230. *Branch*,  
2 538 U.S. at 273. JASTA permits secondary liability under the ATA in appropriate  
3 circumstances, but where such claims seek to hold online service providers liable for publishing  
4 third-party content, § 230 immunity continues to apply, just as it does to any other type of claim.  
5 This is how statutory immunities always work: one statute creates potential liability, and the  
6 immunity shields a defined class from that liability. In *Hui v. Castaneda*, 559 U.S. 799 (2010),  
7 for example, the Supreme Court rejected an argument that a later-enacted liability statute  
8 impliedly repealed an existing immunity, reasoning that no “irreconcilable conflict” was created  
9 by the mere fact that the older “more comprehensive immunity” would protect some defendants  
10 from liabilities created by the new law. *Id.* at 809-10.

11 The same reasoning governs here. Courts routinely apply § 230 to immunize service  
12 providers against claims arising under other federal statutes—including *later*-enacted statutes.  
13 See *Doe v. Backpage.com, LLC*, 817 F.3d 12, 22-23 (1st Cir. 2016) (§ 230 barred claims under  
14 Trafficking Victims Protection Reauthorization Act of 2008), *cert. denied*, 137 S. Ct. 622 (2017).  
15 Most directly on point is *Cohen v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 76701 (E.D.N.Y. May  
16 18, 2017), which applied § 230 to dismiss claims brought under JASTA—in the face of the same  
17 implied-repeal argument Plaintiffs make here. See *Opp. to Mot. to Dismiss* at 27 n.6, *Cohen v.*  
18 *Facebook, Inc.*, No. 16-04453 (Jan. 13, 2017), ECF No. 29. This Court should do the same.

19 Plaintiffs’ argument is especially weak because it relies not on JASTA’s substantive  
20 provisions, but instead on the uncodified findings and statement of purpose that preface the  
21 legislation. *Opp.* 3-5 (citing JASTA § 2(a)(6), (b)). It is well settled that such hortatory  
22 preambles are not law unto themselves, and do not change the scope of the operative provision of  
23 a statute—much less effectuate implied repeals of pre-existing and operative federal laws. See  
24 *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009); accord *Kingdomware Techs.,*  
25 *Inc. v. United States*, 136 S. Ct. 1969, 1978 (2016) (“prefatory clauses or preambles cannot  
26 change the scope of the operative clause”). And in any event, although JASTA’s statement of  
27 purpose expresses a broad goal of combatting terrorism, it says nothing about online service  
28 providers, much less about abrogating existing immunities applicable to them. Nothing in the

1 statement of purpose or findings provides any suggestion—much less a “clear and manifest”  
2 indication (*Hawaii*, 556 U.S. at 175)—that Congress meant to effect a significant change in U.S.  
3 law by eliminating the established protections that § 230 provides for online intermediaries.<sup>1</sup>

4 **B. Section 230 Bars Plaintiffs’ “Functionality” Theory**

5 Plaintiffs’ next theory—that their claims focus not on publishing third-party content but  
6 on the provision of “proprietary functions,” such as “allow[ing] ... accounts to reconstitute”  
7 (Opp. 20-21)—also fails. “[W]hat matters” for § 230 immunity is not the “label[]” placed on the  
8 claim but “whether the cause of action inherently requires the court to treat the defendant as the  
9 ‘publisher or speaker’ of content provided by another.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096,  
10 1101-03 (9th Cir. 2008). This is not a new issue, as Plaintiffs suggest. Opp. 19. On the  
11 contrary, courts have repeatedly—and uniformly—held that an online platform’s provision of  
12 accounts (i.e., functionality) to users is publishing-related conduct protected by § 230. That is  
13 true both in ATA cases—*see Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 970-74 (N.D. Cal.  
14 2016) (“*Fields I*”); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-27 (N.D. Cal. 2016)  
15 (“*Fields II*”); *Cohen*, 2017 U.S. Dist. LEXIS 76701, at \*28-31—and in other contexts, *see*  
16 *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-22 (1st Cir. 2007); *Doe v.*  
17 *MySpace, Inc.*, 528 F.3d 413, 421 (5th Cir. 2008). As these cases explain, § 230 bars such  
18 theories because they seek to penalize a protected publishing decision: “the decision to permit  
19 third parties to post content.” *Fields I*, 200 F. Supp. 3d at 972.

20 Plaintiffs insist that Defendants could have prevented accounts from reconstituting in a  
21 “content-neutral” manner by barring “the incremental naming of accounts which have been taken  
22 down” and “request[ing] friends/followers in bulk.” Opp. 21. But even if those strategies truly  
23

---

24 <sup>1</sup> Plaintiffs mistakenly assert that “[n]o part of § 230 relied upon Constitutional principles.”  
25 Opp. 4. In enacting § 230, “Congress wanted to encourage the unfettered and unregulated  
26 development of free speech on the Internet,” and the immunity protects important First  
27 Amendment principles in ensuring that online platforms are not held liable for disseminating  
28 user expression. *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). Plaintiffs further err in  
suggesting § 230 does not apply because their claims reference federal criminal statutes. Opp.  
19 n.7. Courts have uniformly rejected that argument, holding that § 230’s exception for  
“enforcement” of any “Federal criminal statute,” 47 U.S.C. § 230(e)(1), does not apply to civil  
claims that derive from federal criminal statutes. *E.g.*, *Backpage.com*, 817 F.3d at 23; *Doe v.*  
*Bates*, 2006 U.S. Dist. LEXIS 93348, \*8-12 (E.D. Tex. Dec. 27, 2006).

1 were content neutral—which they are not<sup>2</sup>—that would make no difference. Because a service  
2 provider’s “choices as to who may use its platform are inherently bound up in its decisions as to  
3 what may be said on its platform,” any “attempt to draw a narrow distinction between policing  
4 accounts and policing content must ultimately be rejected.” *Cohen*, 2017 U.S. Dist. LEXIS  
5 76701, at \*29. Contrary to Plaintiffs’ suggestion (Opp. 19), § 230 does not turn on whether an  
6 editorial strategy would require the service provider to make content-based decisions about user  
7 material. So long as the objective of a proffered strategy is to control who can publish or under  
8 what terms, § 230 bars claims based on a provider’s decision not to adopt that strategy. *Lycos*  
9 and *MySpace* make that clear, applying § 230 to claims premised on intermediaries’ failure to  
10 employ supposedly content-neutral strategies, such as barring users from having multiple screen  
11 names, *Lycos*, 478 F.3d at 420, and using age-verification tools, *MySpace*, 528 F.3d at 421-22.  
12 The same is true here: holding Defendants liable because they supposedly failed to block users  
13 from using certain account names or communicating with other users in certain ways would  
14 penalize them for protected publisher activities.<sup>3</sup>

15 Plaintiffs’ theory also would defeat a core objective of § 230: “to encourage interactive  
16 computer services and users of such services to self-police the Internet for obscenity and other  
17 offensive material.” *Batzel*, 333 F.3d at 1028. Plaintiffs assert that, whenever Defendants  
18 “voluntarily” “chose[] to delete an account,” they thereby “assumed responsibility” for any user  
19 action to “reconstitute” that account. Opp. 20-21. But that theory—that a service provider’s  
20 self-policing efforts become the basis for holding it liable for user behavior—is exactly what  
21

---

22 <sup>2</sup> Beyond the fact that the posited strategies would require Defendants to decide what content  
23 may be posted, including by making assessments about “suspicious conduct” by users (Opp. 21),  
24 the entire premise of Plaintiffs’ claims is an asserted connection between objectionable content  
25 allegedly posted on Defendants’ platforms and Micah Johnson’s crimes in Dallas. Absent the  
alleged effect of that third-party content, Plaintiffs’ claims against Defendants have no  
conceivable basis. *Fields II*, 217 F. Supp. 3d at 1124-25; *see also infra* n.3.

26 <sup>3</sup> Plaintiffs’ attempt to focus on the alleged *consequences* of third-party content, such as “new  
27 recruits” (Opp. 20), also fails. Such a claim just as much seeks to hold the platform liable as  
28 publisher—and is just as much barred—as one premised overtly on the content of that material.  
Here, for example, Plaintiffs’ theory is that Defendants “provide[d] personnel to HAMAS” as a  
result of allegedly “giving HAMAS the means to post, save, and distribute videos and other  
messages.” *Id.* That theory is plainly content-based.

1 Congress sought to overturn in enacting § 230. *See Jones*, 755 F.3d at 408 (§ 230 “set out to  
2 abrogate” precedent holding a service provider liable “because it had engaged in voluntary self-  
3 policing of ... third-party content”); *Batzel*, 333 F.3d at 1029-30 (same).

#### 4 **C. Targeting Advertising Does Not Make Defendants Content Providers**

5 Likewise without merit is Plaintiffs’ argument that § 230 does not apply because  
6 Defendants supposedly act as “information content providers” by “targeting ads” and displaying  
7 “composite content.” Opp. 21-23. As already explained (Mot. 11-12), a service provider does  
8 not “develop” content merely by “augmenting the content generally,” *Fair Hous. Council v.*  
9 *Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008)—even where (unlike here) it  
10 “has an active, even aggressive role in making available content prepared by others,” *Blumenthal*  
11 *v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998). A provider loses immunity only “if it  
12 contributes materially to the alleged illegality of the conduct.” *Roommates*, 521 F.3d at 1168.<sup>4</sup>  
13 No such facts are alleged here. Not only were the ads themselves third-party content, but  
14 Plaintiffs do not even suggest that they were objectionable or contributed to the alleged illegality  
15 of any terrorist content at issue. Indeed, Plaintiffs admit that Defendants’ use of targeted ads  
16 applies across their platforms and has no special connection to terrorism or to Plaintiffs’ ATA  
17 claims. *See, e.g.*, FAC ¶ 91. The use of “neutral tools” to place ads alongside third-party  
18 material, *Roommates*, 521 F.3d at 1171, does not defeat § 230 protection.<sup>5</sup>

---

20 <sup>4</sup> Plaintiffs’ brief (Opp. 22-23) misreads this and other case law. The court in *Blumenthal*  
21 expressly rejected the argument that § 230 protection is limited to “passive conduit[s],” and held  
22 AOL immune even though it had solicited, paid for, and “affirmatively promoted” the allegedly  
23 defamatory third-party content. 992 F. Supp. at 51-52. In *MCW, Inc. v. Badbusinessbureau.*  
24 *com, LLC*, 2004 U.S. Dist. LEXIS 6678, at \*32 (N.D. Tex. Apr. 19, 2004), the court held the  
25 defendants acted as “information content providers” because they themselves had supplied titles  
26 and headers that were themselves defamatory. By contrast, the ads here were created by third  
27 parties and are not alleged to be unlawful. Finally, the aspect of *Roommates* on which Plaintiffs  
28 rely involved a service provider that had designed its service to require users to submit content in  
violation of federal law and then made “aggressive use” of that illegal content in conducting its  
business. 521 F.3d at 1172. No such allegations are present here.

<sup>5</sup> Plaintiffs argue that Google is not immune insofar as it allegedly shared advertising revenue  
with users who posted Hamas-related videos. Opp. 23-24. Here again, Plaintiffs cannot explain  
how a neutral revenue-sharing policy (FAC ¶¶ 93-98) materially contributes to the illegality of  
terrorist content. Plaintiffs cite *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), but the  
conduct there—where the service “solicited requests for confidential information protected by  
law” (*id.* at 1201)—is worlds away from what is alleged here. And Plaintiffs’ other cases make

1 **II. ALL OF PLAINTIFFS' CLAIMS FAIL ON THEIR OWN TERMS**

2 **A. Plaintiffs Cannot Show Proximate Causation**

3 As argued in Defendants' opening brief, Plaintiffs' attenuated theory of causation comes  
4 nowhere close to causally linking their injuries to any alleged misconduct by Defendants. Mot.  
5 15-19. The Opposition does not even try to explain how Johnson's crime—or even his alleged  
6 engagement with social media content posted by "black separatist hate groups"—proximately  
7 resulted from any alleged misconduct by Defendants related to the alleged use of their platforms  
8 by persons affiliated with Hamas. Plaintiffs offer only a strained analogy, positing a scenario in  
9 which Smith gives a gun to Jones who leaves it to be found by Billy who, in turn, shoots  
10 Tommy. Opp. 16-18. That anecdote does not support Plaintiffs' convoluted causation theory  
11 and only underscores what is lacking here. Providing an online platform that can be used to  
12 share information about any conceivable issue is not remotely like giving a child a loaded gun.  
13 Like all tools, online platforms can be misused, but that does not mean Defendants peddle in  
14 "dangerous instrumentalit[ies]," *Pratt v. Martineau*, 870 N.E.2d 1122, 1128 (Mass. App. Ct.  
15 2007), much less that they assume legal responsibility merely because bad actors misuse their  
16 services. This is especially so where, as here, the only alleged connection between the alleged  
17 bad actors and the crime at issue is indirect, intangible, and entirely speculative.

18 Plaintiffs erroneously invite the Court to employ a looser causation standard used by  
19 some out-of-circuit courts construing claims under the ATA. Opp. 15-16. As Defendants have  
20 shown (Mot. 16, n.3), that approach ignores both the text of the statute and the weight of  
21 authority, including a recent decision in this district squarely holding that the ATA's "by reason  
22 of" language requires a sufficiently "direct[]" relation between the defendant's alleged material  
23 support and the plaintiff's alleged injury. *See Brill v. Chevron Corp.*, 2017 U.S. Dist. LEXIS  
24 4132, at \*20 (N.D. Cal. Jan. 9, 2017) ("[T]he proximate causation standard articulated by the  
25 Second Circuit in *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013) ... is well-reasoned and  
26

27 clear that simply paying users for content does not fall outside § 230. *Blumenthal*, 992 F. Supp.  
28 at 51-52. In any event, Plaintiffs' cursory allegations fail on their own terms. They make no  
plausible allegation that Google actually shared revenue with Hamas—much less that it did so  
knowingly or that any such hypothetical sharing had any connection to the Dallas shooting.

1 compelling, and the Court applies it here.”). Plaintiffs’ focus on “foreseeability” (Opp. 15-16)  
2 also flies in the face of recent Supreme Court authority confirming that “foreseeability alone  
3 does not ensure the close connection that proximate cause requires.” *Bank of Am. Corp. v. City*  
4 *of Miami*, 137 S. Ct. 1296, 1306 (2017).<sup>6</sup>

5 In any event, Plaintiffs’ claims still would fail even if a looser causation standard were  
6 used. Plaintiffs allege no facts that plausibly could show that Defendants’ “actions were ‘a  
7 substantial factor in the sequence of responsible causation.’” Opp. 15 (quoting *Strauss v. Credit*  
8 *Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013)). Nothing in the FAC suggests that  
9 Defendants’ allegedly imperfect efforts to police their services against use by terrorists were a  
10 substantial factor leading to Johnson’s crime. *See, e.g., Ahmad v. Christian Friends of Israeli*  
11 *Cmtys.*, 2014 U.S. Dist. LEXIS 62053, at \*13-14 (S.D.N.Y. May 5, 2014) (no proximate cause  
12 based on alleged transfer of funds to a large group, some of whom eventually committed terrorist  
13 attacks), *aff’d*, 600 F. App’x 800 (2d Cir. 2015); *Brill*, 2017 U.S. Dist. LEXIS 4132, at \*20  
14 (rejecting attenuated causation allegations). As in *Fields*, Plaintiffs’ alleged chain of causation is  
15 far “too speculative [and] attenuated to raise a plausible inference of proximate causation.”  
16 *Fields I*, 200 F. Supp. 3d at 974 n.4; *Fields II*, 217 F. Supp. 3d at 1127 n.3. This flaw defeats not  
17 only Plaintiffs’ direct liability claims under the ATA, but also their state law claims, which  
18 similarly require a showing of proximate cause.

#### 19 **B. Plaintiffs Cannot Save Their Secondary Liability ATA Claims**

20 Plaintiffs’ Opposition likewise confirms that their claims under § 2333(d) for aiding and  
21 abetting and conspiracy must be dismissed. This is so for several independent reasons.

22 *First*, Plaintiffs’ Opposition does nothing to establish that the act from which their  
23 injuries arose—a shooting in Dallas—constituted “international terrorism” as defined in the  
24 ATA, 18 U.S.C. § 2331(1)(C), and as required to state a claim under the ATA, *see* § 2333(a), (d).

---

26 <sup>6</sup> Plaintiffs further err in arguing that JASTA’s “findings” impliedly relaxed the ATA’s  
27 causation requirement. Opp. 4. JASTA did not amend the “by reason of” language in Section  
28 2333(a) and did not purport to alter the causation analysis this phrase has long been understood  
to require. And in any event, as shown above, the findings and preamble cannot expand or alter  
the operative terms of the statute, which continues to mandate the “by reason of” standard.

1 Plaintiffs do not dispute that the shooting was purely domestic, having been carried out in Texas  
2 by a U.S. citizen born in the United States, against victims who also were U.S. citizens. FAC ¶¶  
3 1, 8-9, 123. And although Plaintiffs try to cast their claims as involving actions by Hamas that  
4 “transcend national boundaries” (Opp. 6), they do not show how their allegations about *this*  
5 *incident* transcended national boundaries as required by the statute. § 2331(1)(C). They do not  
6 allege that the “means” by which Johnson committed his attack involved any communication  
7 with any international terrorist group; that the persons he apparently intended to “intimidate or  
8 coerce” were outside the United States; or that he “operate[d]” or sought asylum overseas. *See*  
9 *id.* Rather, they contend that he was “radicalized” in the U.S. by viewing content from U.S.-  
10 based “black separatist hate groups.” FAC ¶¶ 129, 132.

11 *Second*, Plaintiffs allege no facts that would establish that a designated foreign terrorist  
12 organization “committed, planned, or authorized” the Dallas attack, as § 2333(d) requires.  
13 Plaintiffs’ conclusory and unsubstantiated statements to the contrary (Opp. 2, 5-6, 11)—all of  
14 which rest on allegations that Hamas propaganda influenced “black separatist hate groups” (FAC  
15 ¶¶ 132, 139-142), who in turn created other propaganda that allegedly caused Johnson to be  
16 “radicalized” (FAC ¶¶ 122, 130-131)—are not remotely sufficient. Section 2333(d) does not  
17 permit claims for attacks merely (and indirectly) inspired by a terrorist group’s online postings.  
18 Instead, its plain language requires direct and advance participation by the FTO in the specific  
19 attack at issue. This failure alone defeats Plaintiffs’ claims.

20 *Third*, Plaintiffs ignore the requirement of § 2333(d) that the defendant have conspired  
21 with—or have knowingly provided substantial assistance to—the specific “person” who  
22 “committed” the alleged act of international terrorism. § 2333(d)(2). Plaintiffs do not dispute  
23 that that person is Johnson (FAC ¶¶ 1, 123), yet they do not even try to show that Defendants  
24 knowingly assisted or entered into any agreement with him. Plaintiffs do not mention Johnson in  
25 trying to defend their conspiracy claim, and mention him only once in connection with their  
26 aiding and abetting claim. And although they allege that Johnson made “use of Defendants’  
27 platforms” to “lik[e]” pages calling for the murders of police officers” (Opp. 9-10), they do not  
28 and cannot suggest that this alleged use constituted “substantial assistance” knowingly provided

1 by Defendants to Johnson in the commission of his crimes. Nor can Plaintiffs avoid this problem  
2 by suggesting that the availability of Defendants' platforms provided assistance to Hamas, such  
3 that Defendants supposedly assisted in "Hamas's ongoing engagement in international terrorism"  
4 and had a "tacit agreement [with] Hamas" (Opp. 8-11)—which connections in some inexplicable  
5 way inspired Johnson to shoot police officers in Dallas. Even if all of that could be alleged, it  
6 would not be enough under § 2333(d) because it would not establish that Defendants knowingly  
7 provided substantial assistance to Johnson himself.

8 *Fourth*, Plaintiffs fail to establish the key elements of aiding and abetting—namely, that  
9 Defendants acted with knowledge of a specific illegal scheme and knowingly assisted the  
10 principal violation. Opp. 7 (citing *Halberstam v. Welch*, 705 F.2d 472, 477, 488 (D.C. Cir.  
11 1983)).<sup>7</sup> At most, Plaintiffs argue that Defendants made their services widely available to  
12 billions of users, while being generally aware that some attempting to use their services may  
13 have been affiliated with Hamas. Opp. 8. That is not enough to meet the *mens rea* required for  
14 aiding and abetting liability for Johnson's crime. *E.g.*, *Nigerian Nat'l Petroleum Corp. v.*  
15 *Citibank, N.A.*, 1999 U.S. Dist. LEXIS 11599, at \*25-26 (S.D.N.Y. July 29, 1999) (liability  
16 "require[s] actual knowledge of the primary wrong' by the defendant").

17 Likewise, "[it] has long been recognized that substantial assistance means more than just  
18 a little aid, and requires knowledge of the illegal activity that is being aided and abetted, a desire  
19 to help that activity succeed, and some act to further such activity to make it succeed." *Goldberg*  
20 *v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009). Although Plaintiffs cite *Halberstam*,  
21 they try to dilute its six-factor test (Opp. 8-10) and also ignore its clear requirement that an aider  
22 and abettor must act in some deliberate way to help the actual perpetrator. *See* 705 F.2d at 484,  
23

---

24 <sup>7</sup> In *Halberstam*, the court found that the defendant had "general awareness" of her role in the  
25 illegal criminal scheme because she not only lived for five years with the individual (Welch)  
26 who carried out that scheme, but also witnessed ongoing and direct evidence of his criminal  
27 behavior. 705 F.2d at 486-88. Here, by contrast, Plaintiffs have not alleged that Defendants, "at  
28 the time" they provided their services, even knew about Johnson at all, much less that they had  
some sort of "awareness" of his criminal plan. *Halberstam* also found that the defendant had  
provided "knowing assistance" to the principal violation because, among other things, she acted  
"as banker, bookkeeper, recordkeeper, and secretary ... in an unusual way under unusual  
circumstances." *Id.* The FAC alleges no such acts of specific assistance to Johnson.

1 488 (“state of mind” factor focuses on whether the defendant had “a deliberate long-term  
2 intention to participate in an ongoing illicit enterprise”). Plaintiffs do not suggest (nor could  
3 they) that Defendants had any “desire” to help Johnson carry out acts of violence, that they  
4 knowingly worked with Johnson over an extended period of time, or that they did anything to  
5 encourage Johnson to commit the Dallas shooting. Plaintiffs’ allegations of “assistance” to  
6 Hamas—several levels removed from Johnson’s actions and not remotely like the facts of  
7 *Halberstam*—are insufficiently direct to state an aiding and abetting claim under § 2333(d).  
8 Courts have not hesitated to reject similarly remote allegations of aiding and abetting. *See*  
9 *Goldberg*, 660 F. Supp. 2d at 425 (“[D]efendant’s alleged actions in performing three wire  
10 transfers for [a primary Hamas fundraiser] fail to establish ‘substantial assistance’ of the sort  
11 required to support an aiding and abetting claim.”); *Ryan v. Hunton & Williams*, 2000 U.S. Dist.  
12 LEXIS 13750, at \*29 (E.D.N.Y. Sept. 20, 2000) (allegations of a bank’s “failing to shut down  
13 the accounts sooner” does “not rise to the level of substantial assistance”).

14 *Fifth*, Plaintiffs’ conspiracy theory fails because they have not alleged an agreement with  
15 Johnson (or anyone else) “to participate in an unlawful act.” *Halberstam*, 705 F.2d at 477.  
16 Allegations that Defendants made their services widely available for use by the public, that  
17 Defendants knew generally that some people affiliated with Hamas might try to use those  
18 services, and that Defendants could have done more to prevent Hamas-affiliated users from  
19 being able to post content, do not amount to “indirect evidence” of a conspiracy between  
20 Defendants and Johnson. Whether conspiracy liability can ever be established with proof of a  
21 “tacit” agreement (Opp. 10-11) is beside the point, because nothing Plaintiffs allege or argue  
22 plausibly suggests Defendants were “willing partners” of Johnson. *Halberstam*, 705 F.2d at 486.

### 23 **C. Plaintiff Pennie Cannot Plead a Cognizable Injury**

24 As Defendants showed in their moving papers (Mot. 24-25), Plaintiff Pennie’s claims  
25 also must be dismissed because, as a “first responder” who was neither present during the Dallas  
26 shooting nor a close relative of any victim, he does not and cannot allege a cognizable injury.  
27 *See* FAC ¶ 137. Controlling Texas law defeats Pennie’s argument (Opp. 24-25) that his arrival at  
28 the scene soon after the shooting affords him a basis to sue. *See Uni. Servs. Auto. Ass’n v. Keith*,

1 970 S.W.2d 540, 541-42 (Tex. 1998) (denying mother’s claim even though she arrived at the  
2 scene immediately after auto accident and heard her daughter crying out from inside wreckage).

3 Texas law also bars Pennie’s contention (Opp. 25) that he meets the “closely related”  
4 requirement for bystander claims as a “co-worker and close friend” of some of the individuals  
5 shot by Johnson. *See Hinojosa v. S. Tex. Drilling & Expl., Inc.*, 727 S.W.2d 320, 324 (Tex. App.  
6 1987); *Garcia v. San Antonio Hous. Auth.*, 859 S.W.2d 78, 81 (Tex. App. 1993) (limiting  
7 recovery to “relatives residing in the same household, or parents, siblings, children, and  
8 grandparents of the victim”); *Kiffe v. Neches-Gulf Marine, Inc.*, 709 F. Supp. 743, 745 (E.D.  
9 Tex. 1989) (denying recovery to plaintiff who had only “served with [victim] in close proximity  
10 aboard ship”). Pennie cites *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996), as holding  
11 that “the bond between fellow police officers from the same department cannot be questioned”  
12 (Opp. 25), but that case did not address whether a non-familial relationship between officers  
13 allows bystander liability. *See Sherman*, 928 S.W.2d at 465-67. Plaintiffs also are incorrect that  
14 under *Freeman v. City of Pasadena*, 744 S.W.2d 923, 924-25 (Tex. 1988), foreseeability alone is  
15 enough. “To recover as a bystander under *Freeman*,” a plaintiff must meet all three elements  
16 identified in that case, which are presence, foreseeability, and a close familial relationship.  
17 *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 n.6 (Tex. 1998) (denying  
18 recovery to plaintiff who failed to “meet the third requirement” of familial relationship); *Keith*,  
19 970 S.W.2d at 542 (plaintiff must meet all three elements).<sup>8</sup>

#### 20 **D. Plaintiffs’ Other ATA Arguments Are Meritless**

21 Plaintiffs devote two sections of their brief (Opp. 11-15) to discussing other defects that  
22 independently bar their ATA direct liability claims but that Defendants’ motion did not present  
23 (in light of the many other grounds for dismissal that the motion asserted). This oddity seems to  
24 stem from Plaintiffs’ having copied much of their opposition from another brief their counsel  
25

---

26 <sup>8</sup> Pennie seems to ask this Court to invent, under Texas law, a new first-responder exception  
27 to the physical harm requirement for emotional distress claims. Opp. 25. Doing so would  
28 violate the clear Texas rule that, “[a]bsent physical injury, the common law has not allowed  
recovery for negligent infliction of emotional distress except in certain specific, limited  
instances.” *Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 91 (Tex. 1999).

recently co-filed in another case. *See Gonzalez v. Google, Inc.*, No. 16-cv-03282 (DMR) (N.D. Cal. June 23, 2017), ECF No. 101. Now that Plaintiffs have opened the door, Defendants will address these defects as additional grounds for dismissal of Counts III and IV.

**1. The FAC Fails To Allege Violations of 18 U.S.C. §§ 2339A and 2339B**

For direct civil liability under the ATA, the defendant itself must have committed an “act of international terrorism.” *See* § 2333(a). One of the multiple elements of such an act is the violation of a criminal law (*see* § 2331(1)(A))—here, the laws Plaintiffs accuse Defendants of having violated are the so-called “material support” statutes, §§ 2339A and 2339B. Plaintiffs are incorrect that the FAC alleges facts sufficient to satisfy the strict *mens rea* required for a violation of those statutes.<sup>9</sup> As to § 2339A, Plaintiffs’ reliance (Opp. 12) on *Ahmad*, 2014 U.S. Dist. LEXIS 62053, is misplaced. *Ahmad* dismissed an ATA claim where the plaintiffs failed plausibly to allege that the defendants “kn[ew] or intended that the support would be used [by others] in preparation for, or in carrying out, violations of certain [other] federal criminal statutes.” *Id.* at \*7-12. As in *Ahmad*, the FAC offers no factual allegations establishing that Defendants had such knowledge or intent, and its conclusory assertions are insufficient.

To try to establish *mens rea* under § 2339B, Plaintiffs rely on their allegations that Defendants knew that Hamas is a designated FTO (Opp. 11, 13-14), but that is not enough. The statute also requires a showing that the defendant knowingly provided material support to the FTO. *See Weiss v. Nat’l Westminster Bank PLC*, 768 F.3d 202, 208 (2d Cir. 2014) (“Plaintiffs must show that [the defendant] *both* knew that it was providing material support to [an FTO] *and* knew that [the FTO] engaged in terrorist activity.” (emphasis added)). To satisfy this latter element, the defendant had to know that it was providing support directly to the organization itself—that is, that the support was “coordinated with or under the direction of a designated foreign terrorist organization.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31-32 (2010).

---

<sup>9</sup> Plaintiffs erroneously suggest that JASTA’s uncoded “findings” somehow established a new “recklessness” standard for claims based on §§ 2339A and 2339B. Opp. 4. As explained above (*supra* § I.A & n.6), that prefatory language cannot expand JASTA’s own terms, much less that of other statutes that JASTA did not purport to amend, and nothing in the operative provisions of JASTA establishes a new scienter standard. In any event, Plaintiffs have not plausibly alleged that Defendants *recklessly* provided material support to Hamas.

1 Here, however, nothing in the FAC permits the conclusion that Defendants deliberately provided  
2 support to Hamas.

3 Plaintiffs try to overcome these defects by invoking “willful blindness” (Opp. 13), a  
4 doctrine that, where it applies, is a means of establishing that a party had the requisite  
5 knowledge. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). It requires  
6 “deliberate ignorance,” *United States v. Heredia*, 483 F.3d 913, 918 n.4 (9th Cir. 2007)—that is,  
7 “active efforts” by the defendants to avoid confirming the truth of a given fact, *Global-Tech*, 563  
8 U.S. at 770-71. Even if the doctrine were to apply to the material support statutes, Plaintiffs  
9 cannot meet its strict test because they have not alleged, and cannot allege, that Defendants (1)  
10 were actually aware of a high probability that they were providing material support to Hamas  
11 and (2) made an active and deliberate effort to avoid confirming that fact. *Id.* Vague assertions  
12 that Defendants generally knew that unidentified persons tied to Hamas were among Defendants’  
13 billions of users (Opp. 13) are insufficient. *See Hussein v. Dahabshiil Transfer Servs. Ltd.*, 2017  
14 U.S. Dist. LEXIS 11756, at \*20 (S.D.N.Y. Jan. 27, 2017) (generalized knowledge of risk “is not  
15 the same as knowing or deliberately-indifferent support for terror”).

16 Plaintiffs’ other cases (Opp. 13) do not hold otherwise. It was undisputed in those cases  
17 that the defendants knowingly provided financial services to specific customers who were  
18 involved in terrorism; the only question was whether the defendants also knew of that  
19 involvement. *See Weiss*, 768 F.3d at 208; *Goldberg*, 660 F. Supp. 2d at 428. This case is  
20 critically different. Defendants provide free and widely available online platforms used by  
21 billions of people. Plaintiffs cannot seriously claim that Defendants know the identity and  
22 affiliation of each such person, or that they “knowingly” provide support to each user. Although  
23 Plaintiffs assert that unidentified accounts displayed “the emblems and symbols of HAMAS,”  
24 they do not suggest that Defendants were aware of those accounts, and they admit that  
25 Defendants removed Hamas accounts when it did learn about them. Opp. 14; FAC ¶¶ 55, 69, 72,  
26 75. Plaintiffs offer no authority for their sweeping assertion that the provision of generalized  
27  
28

1 services to the public with knowledge that the services might be used in an unauthorized way by  
2 some unidentified affiliate of an FTO satisfies the “material support” scienter requirement.<sup>10</sup>

## 3                   **2.       Plaintiffs Do Not Allege Other Elements of “International Terrorism”**

4           Plaintiffs also assert that any violation of the material support statutes is automatically an  
5 “act of international terrorism” under the ATA. Opp. 14. Here too, Plaintiffs are incorrect.  
6 Judge Donato’s recent decision in *Brill* is directly on point. The court there rejected the very  
7 argument Plaintiffs make here, holding that an alleged material support violation does not, by  
8 itself, satisfy the other elements of “international terrorism” required by § 2331(1), including the  
9 requirement that the defendant’s conduct “appear to be intended” to achieve a specific terrorism  
10 purpose. *See Brill*, 2017 U.S. Dist. LEXIS 4132, at \*17-18.<sup>11</sup> The same analysis applies here.  
11 Plaintiffs do not even try to explain how Defendants, simply by offering their services to billions  
12 of users around the world, engaged in conduct that “appeared to be intended ... to” accomplish a  
13 terrorist purpose and, further, involved acts that were “violent” or “dangerous to human life.”  
14 § 2331(1)(A)-(B)(i). As in *Brill*, Plaintiffs’ allegations are far removed from the kinds of  
15 substantial and direct assistance to terrorists that have led courts to allow ATA claims premised  
16 on material support. 2017 U.S. Dist. LEXIS 4132, at \*18-20.

## 17                   **CONCLUSION**

18           For all these reasons, as well as those set forth in Defendants’ moving papers, the FAC  
19 should be dismissed without further leave to amend.

---

20  
21           <sup>10</sup> Plaintiffs’ assertion that failing to stop someone’s use of an open Internet platform  
22 constitutes “material support” for terrorism (Opp. 11-12), has no support, and the suggestion that  
23 Defendants could be held criminally liable under §§ 2339A and 2339B simply because certain  
24 users may have posted content online (despite Defendants’ efforts and in violation of their rules)  
25 would raise serious First Amendment concerns. *See* Mot. 18-19 & n.5; *cf. Packingham v. North*  
26 *Carolina*, 137 S. Ct. 1730, 1737 (2017) (First Amendment protects use of social media services).

27           <sup>11</sup> *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir. 2002), is not to the contrary. It  
28 held that providing large sums of money directed to Hamas, knowing of the group’s terrorist  
aims, was an act of “international terrorism.” *Id.* at 1014-15. It did not hold that every violation  
of the material support laws constitutes such an act. *See Brill*, 2017 U.S. Dist. LEXIS 4132, at  
\*17-18. Plaintiffs’ out-of-district cases (Opp. 14) misconstrue *Boim* and disregard key  
provisions of § 2331(1). And in any event, even if knowingly giving large sums of money to  
known terrorist groups were “like giving a loaded gun to a child,” *Boim v. Holy Land Found.*,  
549 F.3d 685, 690 (7th Cir. 2008), offering a general service to millions of people is not, even if  
terrorists may be among those who might receive the service. *Id.* at 699.

1 Dated: July 14, 2017

Respectfully submitted,

2  
3 /s/ Kristin A. Linsley

4 KRISTIN A. LINSLEY (CA SBN 154148)  
5 klinsley@gibsondunn.com  
6 JEANA BISNAR MAUTE (CA SBN 290573)  
7 jbisnarmaute@gibsondunn.com  
8 SHELI R. CHABON (CA SBN 306739)  
9 schabon@gibsondunn.com  
10 GIBSON, DUNN & CRUTCHER LLP  
11 555 Mission Street, Suite 3000  
12 San Francisco, CA 94105-0921  
13 Telephone: (415) 393-8200  
14 Facsimile: (415) 393-8306

15 ***Attorneys for Defendant***  
16 **FACEBOOK, INC.**

17 /s/ Patrick J. Carome

18 SETH P. WAXMAN (*pro hac vice*)  
19 seth.waxman@wilmerhale.com  
20 PATRICK J. CAROME (*pro hac vice*)  
21 patrick.carome@wilmerhale.com  
22 ARI HOLTZBLATT (*pro hac vice*)  
23 ari.holtzblatt@wilmerhale.com  
24 WILMER CUTLER PICKERING  
25 HALE AND DORR LLP  
26 1875 Pennsylvania Avenue, NW  
27 Washington, D.C. 20006  
28 Telephone: (202) 663-6000  
Facsimile: (202) 663-6363

MARK D. FLANAGAN (CA SBN 130303)  
mark.flanagan@wilmerhale.com  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
950 Page Mill Road  
Palo Alto, CA 94304  
Telephone: (650) 858-6000  
Facsimile: (650) 858-6100

***Attorneys for Defendant***  
**TWITTER, INC.**

/s/ Brian M. Willen

BRIAN M. WILLEN (*pro hac vice*)  
bwillen@wsgr.com  
WILSON SONSINI  
GOODRICH & ROSATI, P.C.  
1301 Avenue of the Americas  
New York, NY 10019  
Telephone: (212) 999-5800  
Facsimile: (212) 999-5899

DAVID H. KRAMER (CA SBN 168452)  
dkramer@wsgr.com  
LAUREN GALLO WHITE (CA SBN 309075)  
lwhite@wsgr.com  
WILSON SONSINI  
GOODRICH & ROSATI, P.C.  
650 Page Mill Road  
Palo Alto, CA 94304  
Telephone: (650) 493-9300  
Facsimile: (650) 565-5100

***Attorneys for Defendant***  
**GOOGLE INC.**

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

By: /s/ Brian M. Willen  
Brian M. Willen

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

By: /s/ Brian M. Willen  
Brian M. Willen